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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-494

INTERNATIONAL PHOTOGRAPHERS OF THE MOTION PICTURE INDUSTRIES, LOCAL 659 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BERNARD M. MAMET,
Suite 1326,
327 South La Salle Street,
Chicago, Illinois 60604
(312) 427-7630

Attorney for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on June 21, 1973, enforcing an order of the National Labor Relations Board.

CITATIONS TO OPINIONS BELOW

The Memorandum of the Court of Appeals will not be officially reported and is reproduced in the Appendix to this Petition at App. 113. The majority decision and order of the National Labor Relations Board (App. 90), the Board Chairman's dissenting opinion (App. 107) and the Decision of the Administrative Law Judge finding no violation of the National Labor Relations Act (App. 1) are reported at 197 NLRB No. 134.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1973 (App. 114-115). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not a Regional Director and the General Counsel of the National Labor Relations Board exceed their authority when, at the request of the charging party, they set aside a settlement agreement which was signed by all parties and with which Petitioner fully complied where there was no contention of a further or continuing unfair labor practice.

2. May the National Labor Relations Board hold that industry seniority employment benefits, in the motion picture industry, obtained under an admittedly otherwise legal collective bargaining agreement, represent illegal encouragement of union membership under the National Labor Relations Act solely because the computation of

seniority relates to time worked under such agreement in the face of detailed findings by the Administrative Law Judge, undisturbed by the Board, that employment and employment seniority were not based upon union membership or like considerations.

STATUTE AND RULES AND REGULATIONS INVOLVED

The statutory provisions involved are Sections 8(b) 1(A) and 2 of the National Labor Relations Act, as amended (61 Stat. 140, 29 U. S. C. 158 (b)). They provide as follows:

> SECTION 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7:
>
> * * *
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8] (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender periodic dues once the initiation fees uniformly required as a condition of acquiring or retaining membership.
>
> * * *

The relevant provision of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended (29 C.F.R. Part 102) is as follows:

> Section 102.51 *Settlement or adjustment of issues.* —At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director, with

whom the charge was filed, for consideration facts, arguments, offers or settlement, or proposals of adjustment.

The relevant provision of the Statements of Procedure of the National Labor Relations Board, Series 8, as amended (29 C.F.R. Part 102) is as follows:

> Section 101.7 *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submission and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in section 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

STATEMENT OF THE CASE

This case concerns itself with the employment seniority system in the motion picture industry in Hollywood, California. While the Petitioner, representing the professional motion picture cameramen, is Local 659, IATSE ("Union"), each craft in Hollywood, California has a similar, if not identical, seniority system. The Interna-

tional Alliance of Theatrical Stage Employees ("IATSE") has 22 affiliated local unions in Los Angeles County, California representing from 16,000 to 20,000 employees engaged in the motion picture industry. Petitioner, Local 659, is one such local union. From the time the making of motion pictures reached the level of being considered a major industry, an employer association, now known as the Association of Motion Picture and Television Producers, Inc. ("Association"), handled all collective bargaining for the industry and negotiated an identical agreement for all employers (with the individual employer's consent) without requiring an employer to and irrespective of whether the employer had elected to physically join this employer association. The unions certified[1] to represent the employees are the IATSE and its various craft local unions such as the Petitioner, Local 659. Currently there are approximately 70 employers who are members of the Association and numerous non-members. All such employers, irrespective of membership in the Association, are covered by the identical collective bargaining agreement (App. 17, 94).

Motion picture cameramen possess specialized technical and artistic talent. Their employment is not continuous with one employer but rather is spasmodic and dependent upon whether a particular employer is then making a motion picture and the type of skills and talents he de-

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1. In 1951, the NLRB conducted (under the then law requiring same) one secret ballot "UA" election (union shop authorization) in the instant bargaining unit which it deemed appropriate and which consisted of all motion picture camera employees of the industry employers some of whom were members of the Association, some members of other associations and others, nonmembers of any association. One election was held for all employees irrespective of whether or not their employer had elected to join an employer association. NLRB Case No. 21-UA-2725.

sires. To provide some continuity of employment and to develop and maintain a skilled pool of manpower, the seniority "roster" system in question here came into being in 1949. Basically, it provides for preference in employment for employees who have worked in the "crafts and classifications of work subject to (the collective bargaining) agreement". As regards Local 659, the agreement spells out three seniority groups per classification (such as director of photography, camera operator, assistant cameraman, animation cameraman, *etc.*). No employee is entitled to preference of employment over another employee within the same group—the employer retains the right of selection. The employer must, however, first exhaust the employees available in the first group in a particular classification before moving to the second and must similarly then exhaust the second group before moving to the third. If available employees in all three groups are exhausted, the employer may hire from any source it desires. To obtain roster status, an individual must be employed by an employer signatory to the agreement for 30 days or for a combined total of 90 days by any number of such employers. Once an individual obtains roster status he moves from the lower group 3 to the highest group 1 after having worked 130 days for signatory employers. There is no priority within a group —all employees, no matter when they entered the group, have equal rights of employment. Nor is the situation a dormant one, for as the Administrative Law Judge found, 324 names were added to the cameramen's roster between 1966 and 1970 bringing the total up from around 1200 to in excess of 1500 or an increase of over 25% (App. 25, 26).

The Union has nothing to do with placement on or the maintenance of the roster (App. 27). This is maintained

by the Association exclusively "for all signatories to the Agreement regardless of whether or not the employer is a member of the Association" (App. 23) and placement occurs after an employer committee determines that an applicant meets the employment criterion and the committee's qualifying requirements (App. 23-24). The Administrative Law Judge found that union membership or other union considerations played no part whatsoever in securing roster placements, movement from one group to another or employment (App. 26-28).

In addition to negotiating for all employers and maintaining the roster system for all, irrespective of whether or not an employer is a member of the Association,[2] the Association maintains and administers a "Contract Services, Administration Fund". As the Administrative Law Judge found, "Whether or not an employer is a member of the Association, of an independent association or a member of no association, there is one central Health and Welfare Fund for active employees, one central Health and Welfare Fund for retired employees and one Pension Plan all provided for under the Basic Agreement. In addition, the Basic Agreement provides for a Contract Services, Administration Trust Fund which is administered by the Association and to which employers pay a specified amount for each hour worked by an employee in the unit. Whether or not an employer is a member of

2. The Agreement signed by the non-members of the Association, in effect, delegates to the Association the sole responsibility for bargaining in that the individual employer agrees to be bound by the results of the negotiations between the Association and the Union, retaining the right to withdraw after notification but prior to the commencement of negotiations (App. 17-22). "(N)o individual employer or group of employers has (ever) elected to seek separate negotiations" except one, in business only in the year 1954 (App. 18-19).

the Association, the monies are administered by the Association for the benefit of all those who sign a Basic Agreement and the employees of such employers and used for establishing and maintaining training programs, safety procedures and the experience Roster systems" (App. 22).

The Unfair Labor Practice Charges and the Settlement Agreement

On December 20, 1966, one Joel Colman was denied employment, at the insistence of the union, by MPO-TV of California (an employer covered by the agreement but not a member of the Association) because he lacked roster status. Colman filed Section 8(b)(1)(A) and (2) charges against the Union claiming that the seniority roster was *per se* illegal and additionally that preference in employment was based upon Union considerations with members of Local 659, its permit holders and members of sister locals being given preference in employment over non-members. The matter was retained by the Board's General Counsel for a substantial period of time without a complaint issuing and finally, on November 22, 1968, the Union, pursuant to the Board's Statements of Procedure[3] and its Rules,[4] after extensive discussion with the

3. Section 101.7 of the Board's Statements of Procedure entitled "Settlements" provides in pertinent part as follows: "Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of . . . offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the re-

Board's General Counsel and its Regional Director, entered into an "all party" (including the charging party) written settlement agreement. Disclaiming that it had engaged in any unfair labor practice, and to dispose of the matter, the Union signed the Settlement Agreement agreeing that it would not "interpret our collective-bargaining contracts with the Association of Motion Picture Producers, Inc., its members, or nonmembers in a manner to discriminate against any employee with respect to his initial placement on the Industry Experience Roster on the basis of union considerations," and that preference in employment would not be "based . . . upon membership" in the instant Union or its sister locals. The Settlement Agreement also provided that the charging party, Joel Colman, would be made whole for any loss of back pay, "such amounts to be determined by the Regional Director. . . ." The seniority system (roster) remained undisturbed and the Union, while disclaiming that preference in employment had been granted based upon Union considerations, *i.e.*, membership in the Union or the payment of permit fees, agreed that such Union considerations would have no effect whatsoever on the seniority system.

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spondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel. . . . by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed."

4. Section 102.51, Board Rules and Regulations entitled "Settlement or adjustment of issues" provides: "At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director, with whom the charge was filed, for consideration . . . offers of settlement, or proposals of adjustment."

On July 14, 1969, the Regional Director, pursuant to the Settlement Agreement, determined that Colman should receive two days' pay or $400.00. Although agreeing that the Regional Director would determine the amount of money to be paid, Colman's attorney (Adler) now objected. Over the objection of the Union, the Regional Director permitted Adler to withdraw from the Settlement Agreement. He then, however, refused to issue a complaint against the Union and Adler appealed such refusal to the Board's General Counsel. On December 2, 1969, the General Counsel of the Board affirmed the refusal to issue the complaint and this then appeared to dispose of the matter, the Union having implemented the Settlement Agreement (notice posting, notifications, *etc.*) and at all times being willing to pay the $400.00. Adler then applied for "reconsideration" and on "reconsideration", the Board's General Counsel reversed himself, directing that a Complaint issue.[5]

The Complaint and Trial

A Complaint issued against the Union on September 8, 1970. The Complaint claimed that preference of employment was illegally given to members of the Union, those who paid permit fees to it and members of sister locals and also that the seniority roster system was illegal in its application. The trial of the case consumed eight days

5. The General Counsel directed that a Complaint issue under Section 8(b)(1)(A) of the Act only. The only apparent reason for issuing under Section 8(b)(1)(A) instead of under Section 8(b)(2), or both, was because of the General Counsel's thinking that Colman was not an "employee" under the National Labor Relations Act, but rather was a supervisor and no complaint could issue under Section 8(b)(2). While both sections of the Act protect only "employees", we do not present this issue to the Court in our Petition because of the importance of the other questions in which certiorari is sought.

and on June 18, 1971, the Administrative Law Judge[6] issued a 56 page decision in which he meticulously analyzed all of the facts in the record with respect to General Counsel's contention that the seniority system was illegal generally and in its application. He similarly analyzed the contentions made relative to the permit system and the claimed preference for members of the Union and its sister locals. He factually found that preference did not exist and had not existed and that employment was not based upon Union considerations, Union membership or permit requirements; that the Roster system was a legal application of the concept of seniority and that no violation existed. He recommended dismissal of the Complaint in its entirety (App. 32-62, 88-89).

Post Trial Action and the Divided Board's Decision

Following the issuance of the Administrative Law Judge's decision and the request for an extension of time to consider same, counsel for the General Counsel advised all parties that it would *not* file exceptions in the matter, *i.e.*, that the decision would stand. Adler, as counsel for Colman, then wired the Board seeking an extension of time within which to file exceptions, stating that the request was made "in order to permit (him) to request the Office of General Counsel to reconsider its position with regard to the filing of Exceptions in this matter." Thereafter, on August 27, 1971, counsel for the General Counsel again reversing his position, advised the Board that he "now plans to file exceptions in the above-entitled matters." The General Counsel, not Adler, then filed exceptions and in a 2 to 1 decision, with the Board's Chairman

6. Then called "Trial Examiner".

dissenting, the Board overruled the Administrative Law Judge and found that the motion picture seniority Roster system was illegal *per se* when applied to non-members of the Association. Board Chairman Miller's dissent addressed itself to the efficacy of the Settlement Agreements which had, of course, condoned the legality of the seniority system, absent the existence of preference based upon membership in the Union or the payment of permit fees to it. And even the two-man majority of the Board left undisturbed the findings of the Administrative Law Judge that the Union had engaged in no illegal activity and that preference of employment was not based upon Union considerations, Union membership or the payment of permits in any respect. The majority, as regards the Settlement Agreements, held that ". . . there was no meeting of the minds when the settlement agreements were executed" (App. 93). Dissenting Chairman Miller, commenting on the majority's reasoning, held that "A majority of my colleagues find that there was 'no meeting of the minds when the settlement agreements were executed.' I cannot agree. All parties agreed in writing that the amount of backpay was 'to be determined by the Regional Director in accordance with existing Board formula.' That, in my view, was a binding agreement, and cannot be vitiated merely because one party subjectively 'expected more' than an amount determined by the method to which he had agreed" (App. 107, fn. 19). Chairman Miller stated that "About 4 years ago this case was settled. The settlement agreements were signed by Respondent and Charging Parties and were approved by the Regional Director. The agreements provided for backpay, with the amount to be determined by the Regional Director. He determined the amount to be $400, as to Charging Party Colman. A few days thereafter, Colman asked permission to with-

draw from the agreement. For what reasons we do not know, the Regional Director permitted him to do so, although Respondent asserts, without contradiction, that it was willing at all times to comply with the agreement" (App. 107). Chairman Miller citing "a line of cases going back over the decades and continuing through the years" held that "the agreement should have been honored and, that being true, the complaint should be dismissed and the settlement agreement reinstated" (App. 108); "that a Regional Director may not set aside a settlement agreement and issue a formal complaint **unless the charged party has failed to comply with its terms or committed further unfair labor practices**" (App. 108) (Emphasis supplied). No contention of failure to comply or the commission of further unfair labor practices was made or even alluded to. Citing a list of Board cases, the Board's Chairman concluded that "Considerations of equity also require that a respondent which has in good faith bound itself to a course of complying with such an agreement should be entitled to rely on compliance . . . and not be subject to . . . whim or caprice . . . after a definitive agreement has once been executed . . ." (App. 108). The Chairman was particularly interested in Board policy stating that "We have a real interest in settling charges, since if it were not for the fact that over 90 percent of such charges are disposed of by settlement and other early methods of disposition at the Regional level, this Board would be inundated by such a caseload that we would be totally paralyzed . . . how can we expect Respondents seriously to consider entering upon settlement discussions" if settlement agreements can be set aside when further unfair labor practices are not committed (App. 108-109).

In its divided decision, the Board did not reverse the Administrative Law Judge as regards his findings that employment preference was not based upon Union membership, Union considerations or the payment of permit fees. The Board basically affirmed his findings of fact in this respect and stated that "It is well settled that a bargaining representative for the employees of the particular unit has the right to make seniority depend on the date of hire in the unit and thus give an inferior seniority ranking to employees transferred from another unit" (App. 98). It also acknowledged that individual employers by joining an employer association could have a single seniority system amongst the employees of all such association members. Disagreeing with the Administrative Law Judge, however, the Board majority held that a finding of illegality could revolve solely around whether or not an employer had physically joined an employer association. Despite the fact that employees had worked for many employers covered by the Agreement, all of whom had agreed to be bound by the results of the negotiations between the Association and the Union and had signed the identical contract, the seniority acquired by such employees was no longer of any value and the Union, and, accordingly, the Association and all employers, were prohibited from granting continuous seniority for work performed to such employees. The majority stated that "Since the existence of a collective-bargaining contract connotes representation by a labor organization, the deprivation of employment with employers who are parties to collective-bargaining contracts with Respondent and/or IATSE flows from the failure of an employee to have been previously represented by Respondent" (App. 99). Discrimination occurred, said the majority, because the se-

niority was based upon "union representation" and this was illegal unless the employer physically joined the employer association.

The Court of Appeals Memorandum

On June 21, 1973, the Court of Appeals for the District of Columbia entered judgment enforcing the Board's order. No decision was written and the Court's short memorandum appears at page 113 of the Appendix.[7]

7. No reference was made by the court to the amicus brief filed by the Association which had pointed out that rather than effectuating the purposes of the Act, the Board's order if permitted to stand, would instead create chaos in the industry and destroy the employer's ability to maintain an effective labor pool of specialized craftsmen upon which to draw.

ARGUMENT

REASONS FOR GRANTING THE WRIT

1. The Settlement Agreement. In 1968, to dispose of the present case filed in 1966, the Union entered into a settlement agreement with all parties agreeing that the Regional Director would subsequently determine the back pay, if any, due the charging party. The settlement agreement was entered into in accordance with the Board's Statement of Procedure and its Rules (fns. 3 and 4, *supra*) and had the approval of the Board's General Counsel before being executed by the Regional Director. The procedure was routine and the terms of the settlement agreement standard. The Regional Director determined that there was $400.00 due and thereafter, over the objection of the Union, the charging party secured the approval of the Regional Director to withdraw from the settlement agreement. The Regional Director thereafter dismissed the charge and the dismissal was sustained by the General Counsel who later reversed himself when the matter was submitted to him for "reconsideration". The roster seniority system being attacked herein was left undisturbed by the settlement agreement.

The Court of Appeals Memorandum disposes of the settlement agreement in one sentence, without citation, merely stating that "The Board properly refused to give effect to the aborted settlement agreements between the charging parties and the respondent" (App. 113). Its decision is in direct derogation of this Court's decision in *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 254-255 (1944). Moreover, it conflicts with the decisions of the Fifth, Sixth and Eighth Circuits where the issue has had direct con-

sideration[8] and of the Second, Fourth and Tenth Circuits where there has been implicit consideration.[9] The decisions of the foregoing six Circuits all stem from this Court's decision in *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 254-255 (1944) as is illustrated in *NLRB* v. *Bangor Plastics*, 392 F. 2d 772, 775 (1967) where the court stated "It is only when a party to the settlement agreement has breached its terms or has committed further illegal acts, that the regional director is justified in setting aside the settlement agreement and issuing a formal complaint." The decisions of all six Circuits contained at least a colorable contention that some act or activity of the respondent generated the setting aside of the settlement agreement. Here no such contention was made but the settlement agreement was set aside solely because the charging party did not like the dollar amount which had been determined in accordance with the procedure with which he had previously agreed in writing.

If the Board's order is put into operation, complete havoc will occur and the disruption in the motion picture

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8. **Fifth Circuit:** *News-Texan, Inc.* v. *NLRB*, 422 F. 2d 381 384-385 (C.A. 5, 1970); *NLRB* v. *Southeastern Stages, Inc.*, 423 F. 2d 878, 880 (C.A. 5, 1970). See also, *NLRB* v. *Guild Industries Manufacturing Corp.*, 321 F. 2d 108, 110 (C.A. 5, 1963). **Sixth Circuit:** *Lincoln Bearing Co.* v. *NLRB*, 311 F. 2d 48, 50 (C.A. 6, 1962). See also, *NLRB* v. *Superior Tool and Die Co.*, 309 F. 2d 692, 695 (C.A. 6, 1962). **Eighth Circuit:** *NLRB* v. *Arrow Specialties*, 437 F. 2d 522, 526 (C.A. 8, 1971).

9. **Second Circuit:** *NLRB* v. *Dressmakers Joint Council*, 342 F. 2d 988, 989 (C.A. 2, 1965). **Fourth Circuit:** *Radiator Specialty Co.* v. *NLRB*, 336 F. 2d 495, 497 (C.A. 4, 1964). **Tenth Circuit:** *NLRB* v. *Western Meat Packers, Inc.*, 368 F. 2d 65, 70 (C.A. 10, 1966). In *International Brotherhood of Teamsters, Local 554* v. *NLRB*, 262 F. 2d 456, 459 (C.A.D.C., 1958), the District of Columbia Circuit (fn. 2), without further comment, stated that "Subsequent unfair labor practices allow the Board to go behind the terms of a settlement agreement", vacate it and issue a complaint.

industry will be incalcuable. Moreover, as dissenting Board Chairman Miller pointed out, over 90 per cent of unfair labor practice charges are disposed of by settlement and the Board would be inundated and "totally paralyzed" if settlement agreements were not honored and respondents would thus not seriously consider entering into settlement discussions. The Board Chairman pointed out that considerations of equity and good faith required that settlement agreements be binding and that they not be subject to "whim or caprice." Citing cases "going back over the decade and continuing through the years", the Board Chairman held "that a regional director may not set aside a settlement agreement and issue a formal complaint unless the charged party has failed to comply with its terms or committed further unfair labor practices." He concluded that "In my view the agreement should have been honored and, that being true, the complaint should be dismissed and the settlement agreement reinstated."

Thus, apart from the fact that the holding of the court is in conflict with that of all the other circuits and is in direct derogation of this Court's decision, the problem is even more pervasive, as Board Chairman Miller pointed out. In fiscal 1972 there were 26,852 unfair labor practice cases filed with the Board, an increase of about 13 per cent over the prior fiscal period and almost double the number filed a decade earlier.[10] As regards the unfair labor practice cases closed, the Board reports[11] that 25,555

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10. Thirty-Seventh Annual Report of the National Labor Relations Board for the fiscal year ending June 30, 1972 at page 13.

11. Id. at page 15.

were closed in the same period and of this number 93.3 per cent were closed by the regional offices, meaning that except for the charges withdrawn or dismissed, the balance of the 93.3 per cent were closed by settlement agreements. The settlement procedure, as reflected by the Board's Rules and its Statements of Procedures represent an integral and essential part of its mode of operating with which all practitioners are familiar. Settlement agreements are, of course, utilized by many administrative agencies but the very core of the NLRB is bottomed upon settlement and even apart from avoiding the serious administrative problem, the Act is best effectuated by the adjustment of disagreements because of the continuing nature of labor relations and the fact that a proper balance must be drawn between the corresponding rights and obligations of the participants. Here, the charging party successfully had the written all-party settlement agreement set aside because he disagreed with the amount of money determined by the Regional Director to be paid him—and this in face of the fact that the charging party, with counsel, had signed the settlement agreement and had agreed that the Regional Director would make the determination. Even apart from the effect upon petitioner, the impact upon the motion picture industry, and the fact that the instant decision defies this Court's decision and those of various circuits, it becomes exceptionally clear that Chairman Miller's fear of the potential paralysis of the agency is indeed meaningful. Two members and two members only of the Board deviated from the Board's own rules and determined to vitiate the settlement agreement. The Court of Appeals decision sheds no light upon the problem except to sustain the bare majority holding of the Board. This Court's intervention is essential not only to protect this Petitioner but to protect the litigants

who appear before the Board and the Board's processes, as well.

2. The Legality of the Seniority Roster System. The decision of the Court of Appeals in the instant matter is in direct conflict with this Court's decision in *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667 (1961) and with the decisions of three Circuits[12] issued since *Local 357, Teamsters*. Overruling the Administrative Law Judge, who had relied upon *Local 357, Teamsters*, and specifically "respectfully disagreeing" (App. 97, fn. 8) with the First Circuit,[13] a divided Board held that it was illegal to base industry seniority upon work acquired under a single collective bargaining agreement, *i.e.*, union representation, unless an employer had physically joined an employer association. If an employer had joined an association—here The Association of Motion Picture Producers—then the Board would hold the single seniority roster system herein legal but, said the Board, if an employer does not physically join the Association then such non-association member and employees who had worked for it could not legally share in the valid single seniority system enjoyed by those employers who had joined and were paying dues to the Association. This despite the fact that all employers, whether they were members of the major association (the Association of Motion Picture Producers), small associations or members of no association, as the Administrative Law Judge found, subscribed and agreed to the identical collective bargaining agreement resulting from

12. First, Third and Seventh Circuits: *NLRB* v. *Whiting Milk Corporation*, 342 F. 2d 8 (C.A. 1, 1965); *Rosen* v. *NLRB*, 455 F. 2d 615 (C.A. 3, 1972); and *Schick* v. *NLRB*, 409 F. 2d 395 (C.A. 7, 1969).

13. *NLRB* v. *Whiting Milk Corporation*, 342 F. 2d 8 (C.A. 1, 1965).

one negotiations and creating one central health and welfare fund, one pension plan and one contract services administration trust fund, contributed to by all employers, the monies of which were administered by the Association for the benefit of all employers and all employees for the purpose of establishing and maintaining training programs, safety procedures and the seniority roster systems. The Act is violated, says the Board, because preference in employment is based on union representation—but only violated sometimes. This same union representation under the same collective bargaining agreement is legal but only if the employer coincidentally joins the Association; otherwise the seniority roster system must be maintained for the individual employer alone. Everything else remains the same—the same employee funds, the same contract, the same benefits, the same industry, the same mobility but the line between validity and invalidity is the simple act of joining the Association.

The result of the Board's decision is to do away with industry seniority and the employers resultant ability to maintain an available pool of qualified personnel. Under it Association members would have one seniority system but could not draw upon employees who had worked for non-association signatory employers until they first exhausted their own roster. Conversely, the non-association member could neither draw upon employees who had worked for other signatory employers or for Association members but would be first confined to its own roster. And, even as applied to Colman (the charging party), under what the Board proposes, Colman would not have been entitled to work for MPO-TV of California (the individual employer involved) because it would have had its own individual roster which it would first have

had to exhaust and upon which Colman's name would not have appeared—Colman never having worked for MPO-TV a sufficient amount of time to acquire roster status with it.

The short Memorandum of the Court of Appeals casts no light upon the subject matter, but the result is clear —it upholds the Board and accordingly finds illegality. The decision here goes not to prohibiting preference in employment (seniority) based upon Union membership or Union considerations but rather prohibits senority based upon Union representation under a collective bargaining agreement. As the majority of the Board stated, "Since the existence of a collective-bargaining contract connotes representation by a labor organization, the deprivation of employment with employers who are parties to collective-bargaining contracts with Respondent and/or IATSE flows from the failure of an employee to have been previously represented by Respondent" (App. 99). And, this is the identical position the Board unsuccessfully took before this Court in *Local 357, Teamsters* v. *NLRB,* 365 U.S. 667 (1961).

In *Local 357, Teamsters* v. *NLRB,* 365 U.S. 667 (1961), this Court overruled the Board's *Mountain Pacific* doctrine [119 NLRB 883 (1958)] where the Board stated that only a hiring hall in accordance with the Board's specific dictates would be legal and any other hiring hall illegal. The Board complained that the grant of work being dependent upon union sponsorship would enhance the union's power and control over employment status and that it would be reasonable to infer that the union would be guided in its concession of employment by an eye toward winning compliance with a membership obligation or union fealty in some other respect. This Court, how-

ever, noted that the hiring hall "is a matter of negotiations between the parties" and in overruling the Board held that proof of actual discrimination was necessary; that proof as regards illegal encouragement of union membership did not mean that which was generated from union representation under collective bargaining agreement. The Court stated that "the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence when a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustment of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well" (pg. 675). The Court found that this was not the type of discrimination that illegally encouraged union membership contemplated in *Radio Officers* v. *NLRB*, 347 U.S. 17, 42, 43 (1954). Thus, as this Court—and in the present case, the Administrative Law Judge—pointed out, "the hiring arrangement (or roster system) (does) not violate the Act unless there is specific evidence of preference because of union membership or similar requirement . . ." (App. 43) (Underlining is that of Administrative Law Judge) emphasizing that "it should be noted as has been stated and will appear again post that there is no requirement of union membership nor was there any requirement of union membership nor any established utilization of the permit system, when in effect, prior to the time at which an em-

ployee achieved the necessary time to be (on the roster). In fact membership was not granted until later and although a permit was utilized for certain purposes, to be detailed, it was not mandatory nor required of a person seeking to be placed on the Union's availability list" (App. 34). And, as previously noted, in a 56-page decision, the Administrative Law Judge analyzed every piece of evidence, resolved questions of credibility and found no acts of discrimination. And to this the Board did not demur but held only that the roster system was *per se* illegally discriminatory as regards the employees of those who did not *de jure* join the Association.

Throughout the proceedings, the Board relied upon its decision in *Whiting Milk Corporation*, 145 NLRB 1035 (1964) in which the First Circuit denied enforcement [342 F. 2d 8, 11 (C.A. 1, 1965)]. In the present case, the Board majority announced that "we respectfully disagree with the court's rationale in *Whiting*" (App. 97, fn. 8). The First Circuit in *Whiting* found that a union and employers may bargain for seniority for employees in the bargaining unit and it did not constitute a violation nor were the parties required to bargain "for similar benefits for employees for whom it had no authority to speak" noting that "If this be an unfair labor practice, on the same reasoning so also would it be an unfair labor practice for a union to bargain for an increase in wages for employees in a unit it represented without at the same time bargaining for an increase in wages for employees in a similar unit it did not represent. The long and short of this case is that the Union bargained for and obtained a benefit for employees in the units it represented. This is not illegal discrimination against employees in other units not represented by the Union but only a normal and

natural incident of union representation. Obtaining a benefit for employees may well encourage others to join the union but that side effect does not violate the Act, for 'The truth is that the union is a service agency that probably encourages membership whenever it does its job well.' *Local 357, International Brotherhood of Teamsters, etc.* v. *NLRB*, 365 U.S. 667, 675-676. . . ." Similarly, the Third Circuit in *Rosen* v. *NLRB*, 455 F. 2d 615, 618 (C.A. 3, 1972), upheld the legality of crediting time for pension benefits of work performed only when covered by the collective bargaining agreement stating that "the Fund provides pension for employees in units represented by the Union. This is nothing more than a natural consequence of union representation; it is not an illegal discrimination of employees represented by the Union, since union and non-union workers participate on an equal basis." And, the Seventh Circuit in *Schick* v. *NLRB*, 409 F. 2d 395 (C. A. 7, 1969), found that a seniority provision in a collective bargaining agreement giving preference to employment derived while working under the union agreement was not arbitrary discrimination based upon past union affiliation and that "Collective bargaining representatives have broad discretion to bargain with respect to seniority rights and this discretion should not be interfered with in the absence of some showing that a change in seniority rights resulted from hostile discrimination" (pg. 399). Clearly then, the court's decision in the instant case is in direct conflict with those on the First, Third and Seventh Circuits all of whose decisions follow this Court's dictates in *Local 357, International Brotherhood of Teamsters* v. *NLRB*.

Myriads of seniority systems exist in our country under collective bargaining agreements and in other facets of

our society. There is nothing magical about seniority, it is man-made and made by agreement of the parties. In unionized industries it is made under collective bargaining agreements. As this Court stated in *Aeronautical Lodge* v. *Campbell,* 337 U.S. 521, 526 (1949), seniority rights "derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry", with, of course, the proviso pointed out in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953) that "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to the interests of all whom it represents." This Court in *Ford Motor* noted that the negotiators had broad latitude in negotiating seniority clauses and that they had "a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented." Here, the Union was representing all employees covered by the collective bargaining agreement with "complete good faith and honesty of purpose" in conformance with its statutory obligation to do so. *Humphrey* v. *Moore,* 375 U.S. 335, 349 (1964). Clearly, there is no statutory right to seniority and the Union has no obligation to employees it does not represent but rather it, along with the employers with whom it dealt, exercised its statutory obligation to bargain for the employees it did represent.

The seniority system here was negotiated and designed not only to protect employees covered by the collective bargaining agreement but to recognize the specialized nature of the industry. While protecting the rights of employees under contract, it at the same time permitted the employers unlimited selection within a group and es-

tablished a larger pool from which employers could draw. The contract was not injudiciously drawn. The employers' need for flexibility in obtaining the cameramen possessing the particular artistic skills, special knowledge and temperament to meet the requirements of the particular motion picture production was balanced against the Union's duty to represent the employees covered by the contract and to provide job security for them. Apart from the fact that the Board's decision is legally wrong, if permitted to stand, the disruption in the industry will be incalculable.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

BERNARD M. MAMET,
Suite 1326,
327 South La Salle Street,
Chicago, Illinois 60604
(312) 427-7630

Attorney for Petitioner.

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